

SERVICE DATE – LATE RELEASE JANUARY 31, 2018

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1242

HARTWELL FIRST UNITED METHODIST CHURCH—ADVERSE ABANDONMENT AND
DISCONTINUANCE—THE GREAT WALTON RAILROAD COMPANY, INC.,
IN HART COUNTY, GA.

Digest:¹ This decision denies an application for adverse abandonment of a rail line.

Decided: January 31, 2018

On April 14, 2017, Hartwell First United Methodist Church (Hartwell First) filed an application under 49 U.S.C. § 10903 requesting that the Board authorize the third-party, or adverse, abandonment and discontinuance of approximately 0.25 miles of rail line and associated right-of-way (the Line) owned by The Great Walton Railroad Company (GWRC) in Hartwell, Ga.² Notice of the application was served and published in the Federal Register on May 4, 2017 (82 Fed. Reg. 20,958). Based on the current record, the Board will deny Hartwell First's application.

BACKGROUND

In its application, Hartwell First states that it owns property on both sides of the Line. (Hartwell First Appl. 2.) Hartwell First seeks adverse abandonment and discontinuance in order to quiet title to the property underlying the Line (which it claims to own), have the tracks removed, and pursue its development plans on the property. (Id.) Among other arguments it makes in favor of adverse abandonment, Hartwell First points out that the last service to a local customer on the Line was in 1996. (Id. at 7.) Hartwell First also notes that GWRC voluntarily removed parts of the track in 2008, and that several road crossings have also been removed. (Id. at 7-8.) Hartwell First further notes that in 2015, GWRC leased the Line to a community group,

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² Although this proceeding originally included Hartwell Railroad Company (HRC), the parties agreed that HRC has no interest in the Line, and the Board granted HRC's motion to be dismissed as a party in a decision served on June 2, 2017.

TORCH of Hartwell, Inc. (TORCH), for 99 years to use as a public park, playground, farmer's market, and walking trail. (Id. at 8.) Hartwell First argues that the lease shows that GWRC had no expectation of resuming railroad operations on the Line. (Id.)

GWRC submitted a reply in opposition to the application on May 30, 2017. Among other things, GWRC argues that it intends to use the Line as part of a runaround track. GWRC claims that the runaround track is needed to make service to a customer, Quality Holdings, LLC (Quality), safer and more economical.³ (See GWRC Opp'n 6-7, 14; id., V.S. Anderson 2.) Specifically, GWRC states that it would use the runaround to reposition locomotives for the return trip to Bowersville. (Id. at 14, 31.) GWRC asserts that, without the ability to reposition, it has to push empty cars back to Bowersville with the locomotive at the rear of the train. (See id. at 14.) If the locomotive is at the rear of the train, GWRC states that Federal Railroad Administration (FRA) rules require GWRC to stop and flag each of the 45 crossings along the way, and the conductor must hang off the grab bar on the side of the car for most of the trip, a more cumbersome and less safe process. (See id., V.S. Anderson 2.) GWRC also indicates that the Line may be used by TORCH for tourist excursion service. (See id., V.S. Anderson 13.)

In its rebuttal, filed on June 13, 2017, Hartwell First contends (among other things) that GWRC likely would have abandoned the Line already, but for the fact that abandonment would cause GWRC to lose its title to the portions of the right-of-way on which it holds only an easement for railroad use, which would interfere with the TORCH lease and the rent GWRC receives under that lease. (See Hartwell First Rebuttal 5 & n.4.)⁴

In a decision served on August 31, 2017 (August 31 Decision), the Board directed GWRC to submit supplemental information regarding the TORCH lease and invited replies from Hartwell First and other interested persons. Specifically, the Board expressed concern that GWRC might have violated 49 U.S.C. § 10901 by transferring the Line to TORCH through the lease without authorization from the Board. The Board noted lease terms that appeared to grant full control of the property to TORCH, as well as the absence of lease terms ensuring GWRC's right to provide freight service and terms protecting that service from interference by TORCH. See August 31 Decision, slip op. at 3-4. Accordingly, the Board directed GWRC to explain how it retained the ability to provide freight service and why it believes that "there is nothing in the TORCH Agreement that precludes GWRC from using the tracks if a need exists." Id. at 5 (quoting GWRC Opp'n 25).

³ Quality is located on GWRC's line from Bowersville, Ga., to Hartwell. Aside from the 0.25-mile segment described above, the rest of the Bowersville-to-Hartwell line is not subject to this proceeding.

⁴ On July 3, 2017, GWRC submitted a motion to strike portions of Hartwell First's rebuttal, which it claims are irrelevant and immaterial, and a motion for leave to file surrebuttal. Hartwell First replied in opposition on July 23, 2017. In the interest of a more complete record, GWRC's motion to strike will be denied, and its surrebuttal will be accepted into the record.

GWRC submitted its supplemental information on October 2, 2017, and Hartwell First and TORCH submitted replies on October 30, 2017. On November 3, 2017, GWRC submitted a “Motion to Expedite Handling of Adverse Abandonment Application,” and Hartwell First submitted a reply on November 20, 2017.⁵

DISCUSSION AND CONCLUSIONS

The Board addresses the adverse abandonment first, and then addresses the concerns about the lease raised under 49 U.S.C. § 10901.

I. Adverse Abandonment

Pursuant to 49 U.S.C. § 10903(d), the standard governing any application for authority to abandon a line of railroad is whether the present or future public convenience and necessity (PC&N) require or permit the proposed abandonment. In applying this standard in an adverse abandonment context, the Board considers whether there is a present or future public need for rail service over the line and whether that need is outweighed by other interests. See Norfolk S. Ry.—Adverse Aban.—St. Joseph Cty., Ind. (St. Joseph II), AB 290 (Sub-No. 286), slip op. at 3-4 (STB served Apr. 17, 2012). As part of the PC&N analysis, the Board must also consider whether the proposed abandonment would have a serious, adverse impact on rural and community development. 49 U.S.C. § 10903(d).

The Board has exclusive and plenary jurisdiction over rail abandonments in order to protect the public from an unnecessary discontinuance, cessation, interruption, or obstruction of available rail service. St. Joseph II, slip op. at 4. Accordingly, the Board typically preserves and promotes continued rail service where a carrier has expressed a desire to continue operations and has taken reasonable steps to acquire traffic. But the Board does not allow its jurisdiction to be used to shield a line from the legitimate processes of state law where no overriding federal

⁵ Notwithstanding its title, GWRC’s November 3, 2017 pleading is a reply to a reply, which is typically prohibited under 49 C.F.R. § 1104.13(c). However, because this pleading provides information that is necessary to develop a more complete record, the Board will waive its prohibition here and accept both GWRC’s November 3, 2017 filing and Hartwell First’s November 20, 2017 reply into the record. On November 28, 2017, GWRC submitted another reply to a reply, this time entitled “Motion to Rebut Erroneous Statement and Clarify Legal Position.” Hartwell First submitted a reply on December 12, 2017, asking the Board to reject GWRC’s November 28, 2017 pleading, or in the alternative to accept the substantive response that Hartwell First included. GWRC’s November 28, 2017 pleading, which addresses state property law issues and otherwise merely repeats GWRC’s prior arguments, is not necessary to develop a more complete record; therefore, the Board will reject it together with Hartwell First’s December 12, 2017 reply.

interest exists. Id. In an adverse abandonment case, if the Board concludes that the PC&N does not require or permit continued rail operations over a line, the decision removes the shield of the Board's jurisdiction, thus enabling the applicant to pursue other legal remedies to force the carrier off the line. Id.

Applying these principles and balancing the relevant factors here, the Board finds that the present and future PC&N do not support the requested adverse abandonment. As discussed below, Hartwell First does not demonstrate that rail service on the Line is unnecessary, given GWRC's proposal to rehabilitate the Line and use it to reposition locomotives for the return trip to Bowersville.

Proposed Operational Alternatives. According to Hartwell First, GWRC does not need to rehabilitate and use the runaround track in question because it could reposition locomotives at various other sites. (See Hartwell First Appl. 14 (proposing construction of new facilities at Quality's location, or "somewhere between Quality and Leard Street to the east," or between the trestle that is west of Quality and Bowersville), 25 (proposing use of a runaround at Airline, approximately halfway between Quality and Bowersville); Hartwell First Reply 7, Oct. 30, 2017 (proposing construction of facilities at another site between the trestle that is west of Quality and Bowersville).) GWRC disagrees with Hartwell First's claims regarding the feasibility of these alleged alternatives. (See GWRC Opp'n, V.S. Anderson 14.)

Hartwell First also argues that GWRC's service to Quality is adequate without repositioning locomotives and that "[n]ot having a runaround in downtown Hartwell should not increase the per car costs of serving Quality." (Hartwell First Reply 7, Oct. 30, 2017; Hartwell First Rebuttal 6-8.) As for GWRC's safety concerns, Hartwell First argues that "FRA regulations permit shoving moves as safe operations," and that GWRC could enhance safety by adding cameras to "provide visuals of the crossing." (Hartwell First Reply 7, Oct. 30, 2017; Hartwell First Rebuttal 6-8; Hartwell First Surreply 2-3, Nov. 20, 2017.)

Here, Hartwell First essentially asks the Board to find that the railroad's preferred operations are not necessary and that the railroad should operate in a different way. However, the Board typically is reluctant to substitute its operational judgment for the railroad's. See, e.g., Salt Lake City Corp.—Adverse Aban.—in Salt Lake City, Utah, AB 33 (Sub-No. 183), slip op. at 8 (STB served Mar. 8, 2002) (rejecting applicant's argument that the Board should consider alternative routes that a carrier could use as "it would be inappropriate to substitute our judgment for [the carrier's] business judgment."). In addition, Hartwell First's operational proposals are speculative and unsupported by any significant evidence. Hartwell First states that "it would appear" that GWRC could construct a wye or a runaround at other locations, but it admits that "no railroad engineering studies have been done" that would support its claims. (Hartwell First Appl. 14.) The arguments in Hartwell First's October 30, 2017 reply proposing alternative locations for locomotive repositioning are similarly qualified. (See, e.g., Hartwell First Reply 9, Oct. 30, 2017 ("while it appears that the switch to the propane track, as well as part of the track,

have been removed, it seems that it would not be a difficult task for the propane spur to be reconstructed.” (emphasis added).)

It appears that GWRC only began making a serious effort to redevelop the track several months after Hartwell First began the process of seeking adverse abandonment authority. (See Hartwell First Pet. for Waivers & Exemptions, May 26, 2016; GWRC Reply, June 15, 2016; GWRC Opp’n, V.S. Anderson 10.) The Board also recognizes the substantial effort that appears to be required to restore the Line to active service (see, e.g., Hartwell First Appl., Ex. 10). Nonetheless, the Board will not second-guess GWRC’s judgment about the need for, and usefulness of, the runaround track. Such operational decisions are generally best left for railroads to determine. However, this decision is without prejudice to Hartwell First seeking to reopen or file a new abandonment application, should the rehabilitation or utilization of the Line not occur within a reasonable period of time. See Norfolk S. Ry.—Adverse Aban.—St. Joseph Cty., Ind. (St. Joseph I), AB 290 (Sub-No. 286), slip op. at 7 (STB served Feb. 14, 2008). Due to the unique circumstances of this case, the Board will require GWRC to submit status reports describing its progress with respect to rehabilitation and utilization of the Line every six months, to ensure that the Board and Hartwell First are informed of GWRC’s progress, beginning six months after the service date of this decision.

Property or Contract Rights for Use of Real Property. The parties devote a substantial portion of their pleadings to the issue of whether or not GWRC has title to certain property underlying part of the former runaround track, which Hartwell First refers to as the “north spur.” (See Hartwell First Appl. 3-4, 12-13.) Hartwell First contends that the evidence shows that GWRC has no title to the property where it seeks to reconstruct the runaround track. (Hartwell First Appl. 13-14, 24-25; Hartwell First Rebuttal 9-14; Hartwell First Surreply 3-4, Nov. 20, 2017.) GWRC disputes Hartwell First’s assertion regarding ownership, claiming that its interpretation of the evidence is incorrect. (GWRC Reply 27-34, May 30, 2017; GWRC Surrebuttal 14-25, July 3, 2017.) This property law issue is subject to ongoing state court litigation, in a case that Hartwell First initiated in 2016. (See Hartwell First Appl. 12-13.) GWRC has also filed an eminent domain petition for the property in question with the Georgia Public Service Commission. (GWRC Surreply 6 & Ex. 34, Nov. 3, 2017.) GWRC states that its condemnation filing is not a concession that it lacks ownership, but rather was filed to resolve “a significant cloud” on GWRC’s title. See id., Ex. 34 at 1. In response, Hartwell First argues that condemnation by a railroad is not automatic under Georgia law and requires approval from the Public Service Commission before any condemnation action can be filed in Georgia Superior Court. (Hartwell First Surreply 3, Nov. 20, 2017.)

Regardless of whether these questions of property ownership are answered through the eminent domain case or the existing state court proceeding, such active litigation underscores the fact that ownership issues under state law regarding this property have not been resolved. As the applicant, Hartwell First bears the burden of proof in this proceeding, and its presentation of unresolved state law questions is not enough to carry that burden. See, e.g., Waterloo Ry.—Adverse Aban.—Lines of Bangor & Aroostook R.R. in Aroostook Cty., Me., AB 124

(Sub-No. 2) (STB served May 3, 2004) (in an adverse abandonment proceeding, the applicant bears the burden of showing that the PC&N requires or permits abandonment).⁶

Dormant Rail Line. Hartwell First argues that the Line has not been used for local freight service for more than 20 years and that crossings would need to be reopened to resume rail service. (See Hartwell First Appl. 7-8, 10-11, 20, 24-26; Hartwell First Rebuttal 3-4; Hartwell First Surreply 5, Nov. 20, 2017.) In response, GWRC asserts that it “actively used the runaround track [to reposition locomotives] through 2007.” (GWRC Opp’n, V.S. Anderson 3-4.)

Hartwell First’s argument is not persuasive. Even if its allegations were correct, extended disuse is not sufficient reason to remove rail assets from the interstate rail network when the carrier intends to use those assets to provide freight rail service in a non-speculative manner. See, e.g., *St. Joseph I*, slip op. at 4-7; *City of South Bend v. STB*, 566 F.3d 1166, 1168 (D.C. Cir. 2009) (“Because reassembling a right-of-way may be difficult if not impractical, the Board must, before authorizing an abandonment, give weight to its statutory duty to preserve and promote continued rail service.” (internal quotation marks omitted)). GWRC has indicated such an intent here, through its plan to use the Line to reposition locomotives as part of serving Quality.⁷

II. 49 U.S.C. § 10901 Issues.

In its supplemental information responding to the August 31 Decision, GWRC argues that, notwithstanding the Board’s concerns, “there was *nothing* in the 2015 Lease Agreement that placed any restrictions on GWRC’s right to conduct freight operations” (GWRC Response 3-4, 6-7, Oct. 2, 2017 (emphasis in original).) GWRC states that, nonetheless, it has amended the TORCH lease in a 2017 Lease Amendment (entered into on September 29, 2017) in order to maintain sufficient control over the Line and allow it to use the Line for freight service. (*Id.* at 4.) The 2017 Lease Amendment removes from its scope the western segment of the Line

⁶ Hartwell First also asserts that GWRC never obtained authorization from the Board or its predecessor, the Interstate Commerce Commission (ICC), to acquire and operate the Line. (Hartwell First Appl. 4-6; Hartwell First Rebuttal 3.) GWRC states that the verified notice of exemption it submitted in 1990 encompassed the acquisition and operation of the Line, and that “it appears that the ICC inadvertently failed to publish a notice”; however, GWRC also argues that this issue is irrelevant to the present case. (See GWRC Opp’n 25-26 & Ex. 16.) Hartwell First appears to agree, acknowledging that GWRC’s authority to acquire and operate the Line is “not directly at issue in this proceeding.” (Hartwell First Appl. 5-6.).

⁷ For the same reason, the Board rejects Hartwell First’s implication that, even if GWRC currently intends to restart service over the Line, the adverse abandonment should be granted based on GWRC’s alleged lack of intent to restart service in 2015. (See Hartwell First Reply 4-5, Oct. 30, 2017.) Such a holding would not be consistent with the Board’s duty to preserve and promote continued rail service.

(from Athens Street to Jackson Street), while the segment at the eastern end of the Line (between Jackson Street and Forest Avenue) remains. The western segment, which covers most of the Line at issue here, includes the track running adjacent to (or through) Hartwell First's property and the area where GWRC states that it plans to reconstruct the runaround track. (See GWRC Response 7-8 & Attachment 1 at 3, Oct. 2, 2017.) Hartwell First "acknowledges that the 2017 Lease Amendment, if permitted by the Board, would largely address the transfer issues raised by the Board." (Hartwell First Reply 4, Oct. 30, 2017.)

The Board will not prohibit the amendment. Amending transaction documents is a standard remedy in situations subject to Maine, Department of Transportation—Acquisition & Operation Exemption—Maine Central Railroad (State of Maine), 8 I.C.C.2d 835 (1991), and the record here does not provide a basis for treating GWRC's amendments differently in this respect. See, e.g., Atlanta Dev. Auth.—Verified Pet. for Declaratory Order, FD 35991, slip op. at 9 (STB served Dec. 15, 2016) (allowing amendment of transaction documents).

Although the amended lease now excludes the track that is the subject of the parties' primary dispute and the Board is denying the request for adverse abandonment and discontinuance, GWRC has not fully remedied the § 10901 problem identified in the August 31 Decision. The lease remains in effect for the small segment at the eastern stub end of the Line, between Jackson Street and Forest Avenue. (See GWRC Response 7 & Attachment 1 at 3, Oct. 2, 2017.) The amended lease removes or alters several of the problematic provisions that the Board pointed out in the August 31 Decision, but it still does not include two categories of terms required by the State of Maine line of cases. (See id., Attachment 1.) In particular, the amended lease does not include: (1) terms reserving GWRC's permanent, exclusive right to provide freight rail service over the leased property; and (2) terms retaining sufficient control by GWRC over the leased property to protect GWRC's freight rail service from undue interference by TORCH. Examples of such terms appear in transaction documents discussed in numerous decisions following State of Maine, and the transaction documents themselves are available as attachments to pleadings in these cases. See, e.g., Mass. Dep't of Transp.—Acquis. Exemption—Certain Assets of Housatonic R.R., FD 35866 (STB served Dec. 24, 2014); Massachusetts Mot. 26, Ex. B, Ex. C, Oct. 16, 2014, Mass. Dep't of Transp.—Acquis. Exemption—Certain Assets of Housatonic R.R., FD 35866.

GWRC relies on a term, which the parties added to the amended lease, stating GWRC's "desir[e] to preserve the rail line on the Leased Premises for possible future use by passenger trains," (GWRC Response 11 & Attachment 1 at 6, Oct. 2, 2017); however, that term by itself does not protect GWRC's right to provide freight service on the subject portion of the Line. In fact, in State of Maine cases where the rail line would be used for passenger service as well as freight service, the Board has required terms protecting freight service from interference by the passenger service. See, e.g., Reg'l Transp. Dist.—Acquis. Exemption—Union Pac. R.R. in Adams, Boulder, Broomfield, & Weld, Colo., FD 35252, slip op. at 3 (STB served June 29, 2010). And even if this new lease term had referred to future use by freight trains, rather than

passenger trains, merely noting a “desire” to preserve the Line for possible future use is not the same as expressly reserving a permanent, exclusive right to provide freight service.

GWRC states that TORCH did not intend to assume a common carrier obligation, and GWRC retains its common carrier obligation over the leased portion of the Line. (See GWRC Response 3-4, Attachment 1 at 2, Oct. 2, 2017.) However, as indicated in the August 31 Decision, merely stating such an intent is insufficient if the transaction documents do not contain the protections required under State of Maine. See August 31 Decision, slip op. at 4 (citing S. Pac. Transp. Co.—Aban. Exemption—L.A. Cty., Cal., 8 I.C.C.2d 495, 505, 508 (1992)).

GWRC implies that, because it does not currently need the segment between Jackson Street and Forest Avenue to meet its common carrier obligation, it may lease the segment to a third party without Board authorization, and without including the provisions necessary to protect any future requests for freight service. (See GWRC Response 3-4, 7, 9, Oct. 2, 2017.) But § 10901, by its terms, is not limited to acquisitions of railroad lines currently being used to provide freight service.⁸ As long as the Line remains within the interstate rail network, GWRC may not lease it to a third party without the protections set forth in State of Maine and the cases following it, unless the Board authorizes the transfer as an acquisition. See 49 U.S.C. § 10901(a); Atlanta Dev. Auth., FD 35991, slip op. at 9 (requiring resolution of State of Maine issue for currently unused line).

To remedy these concerns, GWRC and TORCH may amend the lease again to add the terms referenced above. See Atlanta Dev. Auth., FD 35991, slip op. at 9. Alternatively, TORCH may seek after-the-fact authorization to acquire the Jackson Street to Forest Avenue segment by lease and become a rail carrier over that segment.

Conclusion. For the reasons discussed above, Hartwell First’s application for adverse abandonment and discontinuance will be denied. However, to address the issues set forth above regarding 49 U.S.C. § 10901, within 30 days of this decision, either GWRC must file a copy of the lease, amended to include the terms referenced above, or TORCH must file for after-the-fact acquisition authority.

⁸ As noted in the August 31 Decision, slip op. at 3 & n.5, “acquire” includes acquisition by lease as well as purchase. See also Cayuga Cty. Indus. Dev. Agency—Acquis. Exemption—Finger Lakes Ry., FD 36011 et al., slip op. at 5 (STB served July 14, 2016) (example of a State of Maine decision involving a lease from a railroad to a non-carrier).

It is ordered:

1. The application for adverse abandonment and discontinuance is denied.
2. GWRC is directed to submit a status report once every six months, starting on July 31, 2018, describing its progress with respect to rehabilitation and utilization of the Line.
3. By March 2, 2018, either GWRC must file a copy of its lease agreement with TORCH, amended to include the terms referenced above, or TORCH must file for after-the-fact acquisition authority.
4. GWRC's motion to strike is denied, and its July 3, 2017 surrebuttal is accepted into the record.
5. GWRC's November 3, 2017 reply to a reply and Hartwell First's November 20, 2017 reply to a reply are accepted into the record.
6. GWRC's November 28, 2017 reply to a reply and Hartwell First's December 12, 2017 reply to a reply are rejected.
7. This decision is effective on its date of service.

By the Board, Board Members Begeman and Miller.